IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 950 of 1998
with
Civil Application No. 7478 of 2001

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

FAG PRECISION BEARINGS LTD

Versus

VADODARA MUNICIPAL CORPORATION

Appearance:
1. Special Civil Application No. 950 of 1998
MR KH KAJI for Petitioner No. 1-2
MR PRANAV G DESAI for Respondent No. 1
NOTICE SERVED BY DS for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 16/10/2003

CAV JUDGEMENT

The petitioner, by filing this petition under Article 226 of the Constitution of India, has challenged the impugned action of the respondent Municipal

Corporation, including the customs duty element in the value of the goods for the purposes of levy of octroi from the petitioner company in respect of the capital goods and raw materials imported by the petitioner company, on the ground that it is illegal and without any authority of law. The peititoner has also prayed for quashing and setting aside the communications/letters/orders dated 6.11.1996, 15.3.1997 and 12.1.1998 and claimed refund of the octroi duty collected by the respondent Corporation illegally and without any authority of law. The petitioner has further prayed for mandatory direction against the respondent Corporation directing it to forbear from collecting octroi duty from the petitioner company in respect of the capital goods and raw materials imported by the petitioner company without payment of customs duty in view of the exemption granted by the Government of India to the petitioner company.

2. The brief facts, giving rise to the present petition, are that the petitioner is a Public Limited Company, duly registered and incorporated under the provisions of Companies Act, 1956 and is engaged in the business, inter alia, of manufacture of roller bearings and rerolling equipment and for the said purpose the company is having its factory at Maneja, Baroda.

3. The petitioner company was granted exemption by the Government of India, Ministry of Industries, Department of Industrial Policy and Promotion, being the EOU Section of the Secretariat for Industrial Approvals, sanctioning the application of the petitioner No.1 Company and granted facilities and privileges as admissible to 100% EOU. Pursuant to the said exemption/recognition granted by the Government of India, the import of capital goods, raw materials and components for production under the said scheme were/are entitled to the exemption from payment of customs duty for a period of 10 years and that on debonding after the period of export obligation, the petitioner company would be liable to pay customs duty on the capital goods, on depreciated value of the capital goods and on the value of unused imported raw materials as may have been imported by the petitioner company during the said exemption period of 10 years.

4. It is the case of petitioner that Rule 2(19) of the Octroi Rules as framed by the Baroda Municipal Corporation under Section 457(7) and (17) read with Section 149 of the said Act states that the value of the goods means whether octroi is charged on ad valorem shall

mean the value of goods made up of the cost price of the goods as ascertained from the original invoice plus shipping charges, insurance charges, customs duties, additional customs duties, excise duties, countervailing duty, sales-tax, wined fee, freight charges, carriage charges, bank commission and all other incidental charges payable or incurred by the importer till arrival of the goods at the Import Naka.

5. It is also the case of petitioner that since the petitioner company was entitled to the benefit of exemption from payment of customs duty for a period of 10 years, the Central Board of Excise and Customs, Government of India, vide Circular No. F.No.305/52/85-FTT dated 15.4.1987 had clarified that the customs duty would be payable by such 100% EOUs at the depreciated value of the capital goods and on the value of the imported raw materials remaining on expiry of exemption period of 10 years.

6. The petitioner therefore was of the view that a bare reading of the exemption granted by the Government of India read with the Circular issued by the Central Board of Excise and Customs Cell as the definition of value of goods as per Rule 2(19) of the Octroi Rules demonstrate that in so far as the capital goods are concerned, despite the fact that octroi duty is payable in respect of the component of customs duty, the said duty would be payable only after taking into account the depreciated value of the capital goods on expiry of the said 10 years' period. The petitioner is also of the view that in so far as the import of raw materials and levy of customs duty thereon is concerned, the petitioner company would be liable to pay the customs duty only on the unused raw materials on the expiry of the said 10 years' period. In this view of the matter, the petitioner company had not been effecting any payment on account of customs duty for the imported capital goods and raw materials meant for 'EOU'. However, the respondent Corporation has levied and sought to levy and recover the octroi duty from the petitioner company on the invoice value of the capital goods as well as raw materials plus customs duty leviable on the said goods.

7. Being aggrieved by the said action of the respondent Corporation, the petitioner company made applications on 2.11.1996 and 4.11.1996 highlighting the fact of nonpayment of octroi duty on customs duty component and seeking exemption from payment of octroi duty in respect of the goods brought within the limits of the respondent Corporation by the petitioner company.

However, without giving any reason whatsoever or without according any opportunity of being heard, the respondent Corporation vide its letter dated 6.11.1996 rejected the applications moved by the petitioner No.1 company.

8. The petitioners, thereafter, moved other two applications on 11.2.1996 and 19.2.1996 to the respondent Corporation praying, inter alia, for refund of octroi duty wrongly collected by the respondent Corporation in respect of the customs duty component included for the said purpose. The said applications were also rejected by the respondent Corporation vide its communication dated 15.3.1997.

9. The petitioner has made one more attempt vide its application dated 5.6.1997 claiming inter alia the refund of octroi duty wrongly collected by the respondent Corporation in respect of the customs duty included for the said purpose and once again the said application was rejected by the respondent Corporation vide its letter dated 12.1.1998.

10. After rejection of the petitioner's application on 12.1.1998, the petitioner has again made a detailed representation on 2.2.1998 for reconsideration of the whole issue on the ground that in view of the notification issued by the Central Government and the Certificate dated 20.1.1998 issued by the Assistant Commissioner of Customs, confirming the exemption of customs duty on goods being imported for 100% EOU. Despite these facts, since the petitioner's case was not favourably considered by the respondent Corporation the petitioner was left with no other alternative but to file the present petition before this Court.

11. Mr. KH Kaji, ld. advocate appearing for the petitioner submits that the impugned action of the respondent Corporation of levying and seeking to levy, recovery and retain octroi duty on the capital goods by including in the value thereof, the customs duty leviable as on date is grossly illegal, highhanded and also violative of Article 265 of the Constitution of India. He has submitted that as per Rule 2(9) of the Octroi Rules, the value of goods would only include the value mentioned in the invoice and such other documents plus customs duty and other octroi costs as may have been incurred as are payable by the importer of goods at the time of arrival of the goods at the Import Naka. Since the customs duty is not paid/payable or incurred on the capital goods imported by the petitioner company in view of the exemption granted vide order dated 16.10.1995, the

element of customs duty cannot, by any stretch of imagination, be included in the value of goods for octroi purposes. Mr. Kaji has further submitted that even if the customs duty on the import of capital goods and raw materials meant for the EOU is includible for payment of octroi duty, for the purposes of valuation of the said capital goods, the value thereof would only be the depreciated value of the capital goods and also the value of unused imported materials at the end of exemption period of 10 years.

12. Mr. Kaji has further submitted that on the date of filing of the petition, the petitioner-company has imported capital goods worth Rs. 20 Crores and octroi duty illegally collected by the respondent Corporation at the rate of 3.5% ad valorem worked out to Rs. 50 lakhs and hence the Corporation should be directed to refund the said amount of octroi duty collected from the petitioner No.1 Company. Mr. Kaji has further submitted that since the imported raw materials would be consumed fully by and large, without attracting any liability of customs duty, the impugned levy by the respondent Corporation is absolutely without jurisdiction and without any authority of law.

13. In support of his submissions, Mr. Kaji relied on the judgment of Bombay High Court in the case of Ceat Tyres of India Ltd. Vs. Municipal Corporation of Greater Bombay - 1994 - (E.L.T.) Bom., wherein it is held as under;

"Octroi-Valuation-Value of goods not to be loaded with the Customs duty which was not payable at the time of entry of the goods within the Octroi limits but was payable only if the conditions of the Advance Licence were not fulfilled. "In our judgment, it is not permissible for the taxing authority to load the value of the article by including the customs duty because the customs duty was not payable at the time of charging tax. It is not open for the octroi authorities to include the customs duty in the value of the article merely because at some future point of time the company may be liable to pay customs duty in case the company commits a breach of the conditions of the advance licence."

14. Mr. Kaji has further relied on the Bombay High Court Judgment in the case of Ceat Limited Vs. Municipal

Corporation of Greater Bombay - 1999 (106) ELT 308 (Bom.), wherein, after following its earlier decision in the case of Ceat Tyres of India Ltd. Vs. Municipal Corporation of Greater Bombay (Supra), the Court has held that the Corporation has no authority to recover the excess octroi duty by loading the value of the article by inclusion of notional customs duty.

15. Mr. Pranav G. Desai, learned advocate appearing for the respondent Corporation submits that the relief claimed by the petitioner company involves the disputed questions of facts and adjudication of the said claim requires recording of evidence and the petition is therefore not maintainable. Mr. Desai has further submitted that the petitioner is having other alternative efficacious remedy available and therefore petitioner is not entitled to invoke the writ jurisdiction of this Court under Article 226 of the Constitution of India. Mr. Desai has also submitted that the petitioner's claim regarding refund cannot be entertained at this stage as the petitioner has come at the preassessment stage and the assessment has not been made so far as the determination of the octroi duty is concerned. Mr. Desai has also submitted that the respondent Corporation is levying and collecting octroi duty in accordance with the Octroi Rules and Octroi Standing Orders framed under the provisions of Section 457(7) and (17) read with Section 149(1) as well as Section 466(1) of the BPMC Act. Mr. Desai has further submitted that Exemption Certificate issued in favour of the petitioner pertains to the Export Oriented Scheme framed by the Ministry of Industries, Government of India, and there are terms and conditions attached thereto, which are only applicable to the said scheme and it has nothing to do with the levy and collection of octroi from the petitioner company by the respondent Corporation. Mr. Desai has further submitted that the levy and collection of octroi is governed under the provisions of Octroi Rules and Octroi Standing Orders. Mr. Desai has further submitted that in the Bill of Entry for warehousing, the customs authorities, after considering the value of goods and other miscellaneous charges, arrived at the assessable value in Indian rupees and fixed up the amount of duty. The customs duty is determined by the concerned Customs Authorities. As per the provisions contained in Rule 2(19) of the Octroi Rules, the amount of customs duty would be payable only after taking into consideration the depreciated value of the capital goods on the expiry of the said 10 years' period.

16. Mr. Desai has submitted that two decisions of

the Bombay High Court relied upon by the petitioner are not applicable to the facts of the present case as in the Bombay case there was total exemption and no quantification of liability was made. He has further submitted that the scheme in Bombay case as well as in the present case are totally different and hence the ratio of the said decisions cannot be applied to the facts of the present case.

17. Mr. Desai has submitted that the petitioner company has not furnished any bill or invoice and hence octroi duty was charged on estimate basis. He has invited the attention of this Court to the receipts issued by the Corporation showing the amount received on "no bill" basis. Mr. Desai has also referred to the correspondence indicating that the details were immediately called for by the respondent No.1 from the petitioner. However, those details were not furnished and assessment could not be completed. It is open for the respondent Corporation to finalise the best judgment assessment. However, since the petition was pending before this Court the said exercise was not done. In support of his contention, he relied on the decision of the Hon'ble Supreme Court in the case of H.M.M. Ltd. Vs. Director of Entry Tax, West Bengal and Others - AIR 1983 SC 586, wherein it is held as under;

> "The Rules of 1970 have been kept alive by the provisions of Sec. 1(3) of the Ordinance and Sec. 37(2) of the Act of 1972, and it is open to the Entry Tax Officer to resort to the "best judgment" method for ascertainment of the value of the goods under Rule 12(2) provided the requirements thereof are satisfied, namely, that the value is not ascertainable on account of non-availability or nonproduction of the bill or invoice or consignment note issued by the consignor or other documents of like nature or other documents showing other charges, duties and fees or that the Assessing Officer is not satisfied about the reasonableness of the value shown or declared by the dealer."

18. Mr. Desai has further submitted that the petitioner cannot claim exemption from payment of octroi duty merely on the basis of Certificate issued by the Union of India in respect of nonpayment of customs duty subject to fulfillment of certain conditions. The octroi duty is to be levied at the time when the goods are

brought in the territory of the Corporation limits and one has to see the position as on the date of entry of the goods and not on the basis of any subsequent event. Since the quantification was already made by the Octroi Department with regard to the customs duty payment, the petitioner is under an obligation to pay the octroi duty on the customs duty component. In this connection, he relies on the decision of the Hon'ble Supreme Court in the case of Agricultural and Processed Food Products vs. Oswal Agro Furane and Others - AIR 1996 SC 1947, wherein the Hon'ble Supreme Court has held that under no circumstances, Oswal Agro was entitled to any order, interim or final, which could have allowed it to clear the goods without payment of excise duty. The Supreme Court clearly observed that the Oswal Agro has overlooked the statutory provisions of Sections 3 and 5A of the Act and got an unfair and undue advantage as a result thereof. It was, therefore, not only liable to pay the amount of excise duty which was due and payable, but it also has to pay interest thereon.

19. Initially, this Court has not granted interim relief. The petitioner, therefore moved a Civil Application No. 4382 of 1998, and while disposing of the said application, the Court has observed that the matter strikes at the very root of the jurisdiction of the Court, and even if prima facie case is shown by the petitioner, it may happen that ultimately the prima facie case may turn out to be fully devoid of any merits and in such situation the Court has to guard against the abuse of the Court's process. The Court has, therefore, not granted any interim relief, but to protect the interests of both the parties, the Court has directed that the respondents who are levying octroi duty shall without further litigation for raising any dispute, refund the amount of octroi paid by the petitioners to the extent that the recovery is held illegal or invalid in the event of the petitioners succeeding in the petition, within 3 months from the date of the decision in the petition with 9% interest on the amount that becomes refundable pursuant to the decision of this Court, or refund the sum found to be levied excessive, after 10 years if the Government prefers to levy 30% of the customs duty. This Court has further directed that the respondent Corporation shall pass a resolution in its General Meeting, if necessary, and authorise its Commissioner or respondent No.2 on its behalf to file appropriate undertaking agreeing to refund the amount as hereinstated with the condition within 30 days from the date of this order.

20. The above interim order passed by the Court merely shows that the Court has envisaged two eventualities. One, if the petitioner succeeds in the petition, the entire amount paid by way of octroi duty on the customs duty component would be paid back to the petitioner along with interest at the rate of 9%, and secondly if the customs authorities decide to levy customs duties after the expiry of the period of 10 years on the depreciable value of the goods so imported, the corresponding amount of octroi duty would be payable by the petitioner, to the customs authorities.

21. During the pendency of the petition, a letter was issued by Assistant Commissioner of Customs on 1.12.1998 stating that all consignments of capital goods, raw materials, spares/components and consumables imported by the petitioner for its 100% Export Oriented Unit from time to time during the period from 1996 to 1998 were exempted from payment of customs duty including CVD in terms of Notification No. 13/1981 dated 9.2.1981 and Notification No. 53/97 dated 3.6.1997 issued by Central Government. Based on these notifications at the time of clearance of goods, no customs duty has been recovered from the said importer. The petitioner, therefore, moved another Civil Application No. 7478 of 2001 seeking prayer against the respondent Corporation to restrain it from levying and collecting octroi duty from the petitioner company on the notional amount of customs duty on the capital goods, raw material and stores and spares etc., imported by the petitioner for its 100% EOU since the petitioner has been exempted from payment of customs duty. This Civil Application was ordered to be heard along with main petition. This is how the Court has heard the main petition and the Civil Application together.

22. The Court has examined the rival contentions of the parties and also gone through the relevant statutory provisions contained in the Act as well as in the Rules and the authorities cited by both the parties. Though Mr. Desai has strenuously argued that the Bombay cases are not applicable to the facts of the present case and they are clearly distinguishable, this Court however is not inclined to accept the said proposition as the issue before the Bombay High Court as well as before this Court are more or less on the same compass. In the Bombay case, the issue was with regard to value of goods not to be loaded with the customs duty which was not payable at the time of entry of the goods within the octroi limits but was payable only if the conditions of the advance licence were not fulfilled. In the present case also,

the petitioner's case is that the value of the goods not to be loaded with the customs duty which was not payable at the time of entry of the goods within the octroi limits on the basis of the Certificate issued by the Customs Department, and it was payable only if the conditions of Notification pertaining to 100% EOU are violated. In Bombay case, the quantification was made and the amount of Customs duty was paid under protest and the refund was claimed thereafter. Here, in the present case also, the petitioner has been paying octroi duty on the amount of customs duty which is includible in the Bill of Entry and the said payment is challenged before this Court and refund is also claimed. The Bombay High Court has specifically held that it is not permissible for the Taxing authority to load the value of the article by including the customs duty because the customs duty was not payable at the time of charging tax. It is not open for the octroi authorities to include the customs duty in the value of the article merely because in some future point of time the company may be liable to pay customs duties in case the company commits breach of the conditions of the advanced licence. The present scheme also incorporates the same condition. The petitioner has also challenged the payment of octroi duty on the customs duty component as the customs authority has granted the exemption and the petitioner was not called upon to pay customs duty on the capital goods imported for 100% EOU, and hence there is no question of making any payment of octroi duty on the said customs duty component. The authorities relied upon by Mr. Desai are rendered altogether in different context and they have no application to the facts of the present case. Mr. Kaji has ably demonstrated that the issue raised by Mr. Desai with regard to "No Bill" has no substance as the petitioner has already furnished the Bill of Entries which contained all necessary details. Even otherwise the petitioner is not asking for final adjudication at this juncture and the petitioner is ready and willing to face the assessment proceedings but the issue raised by the petitioner has to be decided by this Court as to whether the customs duty component is includible in the value of the goods for the purpose of levy and recovery of octroi duty.

23. In the above view of the matter, this Court is in full agreement with the view taken by the Bombay High Court, and is of the opinion that the customs duty component is not includible in the value of the goods, and the respondent Corporation is not entitled to levy and recover the octroi duty on such customs duty component which is shown in the value of the goods. It

is further made clear that the Court has not made any factual ascertainment of the respective claims of the parties, and it is open for the respondent Corporation to call for the details and finalise the assessment as expeditiously as possible, and after the assessment is made, as per the interim order passed by this Court, the Corporation is directed to refund the excess amount of octroi duty which was levied and collected by it from the petitioner. The petitioner is also directed to furnish an undertaking to this Court with a copy thereof to the respondent Corporation stating that in case in future any amount is found to be due and payable on account of customs duty on the capital goods so imported as a result of any breach or otherwise the petitioner will pay the octroi duty to the respondent Corporation on such amount of customs duty, as directed by this Court.

24. With the aforesaid direction, the petition is allowed to the above extent. Rule is made absolute with no order as to costs. In view of the order passed in Special Civil Application, no order on Civil Application. It stands disposed of accordingly.

25. For removal of dout, it is once again made clear that the petitioner is directed to submit all the details which are necessary for the purpose of completion of assessments from 1996 onwards within one month from today. The respondent Corporation is directed to complete the assessment on the basis of the decision taken by this Court in the present judgment within one month from the date of receipt of the details from the petitioner. After completion of the assessment, the respondent Corporation is directed to refund the excess amount collected within three months from the date of the completion of the assessment along with interest at the rate of 9% p.a. from the respective date of payment till the date of refund. The petitioner is directed to furnish undertaking as per this Court's direction made hereinabove, within three weeks from today.

rmr. [K.A. Puj, J.]